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IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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:: JUDGMENT ::

Sarfaraj & Anr. Vs. Smt. Laduri

S.B. CIVIL SECOND APPEAL NO.26/2007.

Against the judgment and decree dated 26.08.2006 passed by Additional District Judge No.1, Jodhpur in Civil Appeal (Decree) No.04/2006 affirming the judgment and decree dated 17.12.2005 passed by Additional Civil Judge (Junior Division) No.1, Jodhpur in Civil Original Suit No.202/1996.

Date of Judgment :: 3rd August 2007.

PRESENT

HON'BLE MR. JUSTICE DINESH MAHESHWARI

Mr. H.R. Soni, for the appellants.
Mr. R.K. Thanvi, for the respondent.

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BY THE COURT:

This second appeal has been preferred against the judgment and decree dated 26.08.2006 passed by the Additional District Judge No.1, Jodhpur affirming the judgment and decree dated 17.12.2005 passed by the Additional Civil Judge (Junior Division) No.1, Jodhpur in Civil Suit No.202/1996 whereby the learned trial court has proceeded to decree the suit filed by the plaintiff-respondent for eviction and

recovery of arrears of rent on the ground of sub-letting, non-user of the suit premises and default in payment of rent. It appears that both the defendants, the tenant Sarfaraj and the alleged sub-lettee Kailash were the appellants before the first appellate court; and they are co-appellants before this Court too.

The suit seeking eviction of the tenant was filed on 03.10.1996 by the landlord Smt. Laduri through her son and special power of attorney holder Arjun Prajapat on the allegations that by way of oral agreement the premises were let out in the year 1991 on a monthly rent of Rs.500/- per month; that the defendant had made payment of rent upto 31.01.1996 and has defaulted in payment of rent thereafter. The plaintiff also alleged that the defendant was not using the suit premises from last six months without any just and reasonable cause and the premises were lying vacant. It appears that the ground of sub-letting was added by way of an amendment in the plaint that was permitted by the order dated 12.05.1999. In relation to this ground, the plaintiff alleged that after filing of the suit, the tenant has sub-let the premises to the defendant No.2, Kailash son of Kishan Chand Sindhi without any permission of the landlord and without her consent; that the plaintiff was not aware of the rate of rent of such sub-letting; that the said sub-lettee to whom the

defendant has handed over possession was carrying on the business of audio cassettes in the suit premises; and that the said sub-lettee was challaned for noise pollution for playing audio cassettes at a high pitch. The defendant-appellants denied all the grounds of eviction and it was alleged by the tenant-defendant No.1 that the plaintiff was recovering enhanced rent at Rs.255/- per month; and made the counter-claim for fixation of standard rent @ Rs.120/- per month.

On the pleadings of the parties, the learned trial court framed the following issues for determination of the questions involved in the case :-

"1/ आया वाद ग्रस्त प्लोट वादिनी का खरीद सुदा है ?

- वादिनी

2/ आया प्रतिवादी ने वादिनी द्वारा वाद ग्रस्त प्लोट पर निर्मित दुकान 500/- रूपये मासिक किराये पर अलावा पानी बिजली व गृह कर के मौखिक किरायेदारी पर ली ?

- वादिनी

3/ आया प्रतिवादी छः माह से अधिक समय से किराया अदा नहीं करने के कारण डिफाल्टर हो गया है ?

- वादिनी

4/ आया प्रतिवादी बिना युक्ति युक्त कारण के वाद ग्रस्त परिसर का उपयोग दावा करने के लगातार छः माह पहले से नहीं कर रहा है ?

- वादिनी

5/ आया प्रतिवादी ने दुकान को सबलेट कर पजेशन पार्टविद् किया है ?

- वादिनी

6/ आया वादिनी वाद पत्र पद सं. 5 में वर्णित कारणों के आधार पर खिलाफ प्रतिवादी बेदखली की डिक्री पाने की हकदार है ?

- वादिनी

7/ आया वादिनी प्रतिवादी से बकाया किराये के रूपये चार हजार पांच सौ रूपये वापरास के प्राप्त करने की अधिकारिनी है ?

- वादिनी

8/ आया वाद वादिनी कानूनी रूप से अनधिकृत मुख्त्यार की तरफ से किया होने से काबिल खारिज है ?

- प्रतिवादीगण

9/ अनुतोष ।

10/- आया विवादित परिसर का मानक किराया 120/- मासिक तय किया जाना उचित है ?

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11/- आया मानक किराया से अधिक वसूल की गई राशि रूपये 3255/- प्रतिवादी भविष्य के किराये पेटे समायोजित करवाने अथवा रिफंड पाने का अधिकारी है ?

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In evidence, on behalf of the plaintiff, her son and special power of attorney holder Arjun Prajapat was examined as PW-1, Mool Shanker as PW-2, Daulat Ram as PW-3 and Rajendra Kumar Verma as PW- 4 whereas on behalf of the defendant, the tenant Sarfaraj was examined as DW-1, and

K.M. Peshwani (father of the alleged sub-lettee) was examined as DW-2.

The learned trial court held issue No.1 to be redundant as the title to the property was not involved in the suit. In relation to issue No.2, after considering the rival stands, the learned trial court found that the plaintiff has of course not been able to establish by direct evidence that the rent of the premises was Rs.500/- per month but then noticed the fact that the defendant asserted that he had made payment of rent by way of cheques at the rate of Rs.225/- per month and observed that the statement of accounts or the pass-book of the relevant bank account was not produced nor the defendant has produced any reliable evidence to prove the rate of rent at Rs.225/- per month; and relevant documentary evidence concerning payment of rent by cheque has been withheld by the defendant. Looking to the circumstances of the case, location of the premises at a commercial place and its size of 10 ft. x 25 ft., the learned trial court was of opinion that it did not appear unreasonable that the rent of suit premises was Rs.500/- per month in the year 1991.

In relation to the question of default in issue No.3, the learned trial court was of opinion that if the landlord was not supplying the receipt of payment then the tenant ought to have made payment of rent by way of money order or cheque;

or rent could have been deposited in the bank account of the landlord after obtaining particulars thereof and if the landlord declined to furnish such details or to accept payment, the rent could have been deposited in Court under Section 19-A of the Rajasthan Premises (Control of Rent & Eviction) Act, 1950 ('the Act'). The learned trial court found that there was no material on record to show that the rent for the months of February 1996 to August 1996 was paid to the plaintiff nor there was any evidence that the defendant No.1 has complied with the provisions of Section 19A of the Act and, therefore, held him defaulter in payment of rent.

In issue No.4, the learned trial court noticed the stand of the defendant that he had informed the plaintiff that he would be using the suit premises for the purpose of lathe machine work, for assembling the machines, and for electric motor rewinding work, and so also for storage of cement for his contract work; but also noted the admission of the defendant in cross-examination that he has taken the suit premises for motor rewinding work and machinery work. The learned trial court observed that the work concerning the machineries and that of storage of building material were altogether different and normally one shop cannot be used for both. The learned trial court found that the tenant has failed to produce any documentary evidence of his having

carried out any work in the suit premises from the month of February 1996 till filing of the suit; and found from the electricity bill for the month of September 1996 that there was 'zero' consumption and the premises were shown locked. On all these considerations, the learned trial court was of opinion that the defendant has not been able to establish that he has been using the premises for the purpose of motor rewinding and lathe machine work before filing the suit; ; and observed that by stating use of the premises as godown, the defendant No.1 cannot take the defence that he has used the premises during the relevant period.

In relation to issue No.5 concerning the question of sub-letting and parting with possession, the learned trial court noticed that the said sub-lettee Kailash did not appear in evidence but his father K.M. Peshwani appeared as DW-2 and suggested that his son was never in possession of the suit premises and he was carrying on business of audio cassettes in the adjoining premises. However, the learned trial court found with reference to the documentary evidence Ex. 3 to Ex.6 on record that the said sub-lettee Kailash had been challaned twice over for creating noise pollution at shop No.10 (the suit shop) while playing audio cassettes at higher volume. With reference to such evidence, the learned trial court found that the defendant No.1 has sub-let and handed over

possession of the suit premises to the defendant No.2. Therefore, the learned trial court held the plaintiff entitled for decree for possession on this ground alone.

In relation to the question posed in issue No.8 about entitlement of the plaintiff's son to maintain the suit, the learned trial court referred to the special power of attorney produced on record as Ex.2, and rejected the objection raised on behalf of the defendant No.1. It was contended that under the said special power of attorney, the respondent-landlady has extended authority to her son to file the suit only for the purpose of getting the premises vacated on the ground of requirement of her grand-son and no other purpose being permitted, the present suit filed for recovery of arrears of rent and for eviction on the grounds of default, non-user and sub-letting, is entirely unauthorised. The learned trial court observed that where the power of attorney was extended for the purpose of getting the suit premises vacated, that included all the legal proceedings and included taking of the grounds on which the suit could be maintained on behalf of the plaintiff. The learned trial court found that the power of attorney in question was executed on 03.10.1996 and the suit was also filed on 03.10.1996 and, therefore, it was apparent that the special power of attorney was extended only for the purpose of filing of this suit.

While rejecting the counter claim of the defendant for fixation of standard rent, the learned trial court also found that the defendant had been defaulter in making payment of rent that was provisionally determined by the court and also noticed that this Court had provisionally determined the rent at Rs.400/- per month; and the rent was not deposited in conformity with the order of this Court. Learned trial court observed that even if it be assumed that the defendant had deposited rent at the rate of Rs.255/- per month, that was less than the rent determined provisionally and, therefore, the defendant was not entitled for any relief under Section 13(6) of the Act towards first default. The learned trial court, therefore, decreed the suit thus:

> "दावा वादिनी विरूद्ध प्रतिवादीगण मय खर्चा डिक्री किया जाकर प्रतिवादीगण को आदेशित किया जाता है कि वे वादग्रस्त किरायेसुदा दुकान जिसका कि वर्णन वादपत्र के मद सं. 1 में किया गया हैं, को अन्दर अवधि दो माह खाली करके उसका वास्तविक कब्जा वादिनी को सौंप दें । वादिनी प्रतिवादी सं. 1 से दिनांक 01.02.96 से 30.09.96 तक का बकाया किराया 500/- प्रतिमाह की दर से कुल 4000/- प्राप्त करने की अधिकारिणी है । उक्त किराया राशि यदि प्रतिवादी सं. 1 द्वारा वादिनी को दायरी दावा के पश्चात अदा कर दी गई हो तो उसे प्रतिवादी सं. 1 समायोजित करा पाने का अधिकारी है । वादिनी प्रतिवादी सं. 1 से वादग्रस्त दुकान का हर्जा स्तेमाल तामिलने दखल तक अतिरिक्त न्याय शुल्क पेश किये जाने पर 500/- प्रतिमाह की दर से प्राप्त करने की अधिकारिणी है दावा दायरी के पश्चात उक्त अवधि का कोई किराया राशि यदि प्रतिवादी सं. 1 ने वादिनी को अदा कर

दी हो तो वह उसे समायोजित करा पाने का अधिकारी होगा । काउन्टर क्लेम प्रतिवादी सं. 1 खारिज किया जाता है ।"

Before the learned first appellate court, practically the same submissions were reiterated in the appeal on behalf of the defendants, i.e., the original tenant and the alleged sub-lettee. The first and foremost contention urged on behalf of the appellants had been concerning the power of attorney extended in favour of her son by the plaintiff-landlady and competence of the suit filed on her behalf by the power of attorney holder. The learned appellate court proceeded to put interpretation on the said document (Ex.2A) that the plaintiff-landlady has extended special power of attorney in favour of her son for the purpose of getting the suit premises vacated and observed that the hyper-technical suggestion put forward by the defendant No.1 in relation to the said power of attorney could not be countenanced. The learned appellate court also endorsed other findings of the learned trial court on the grounds of default, non-user and sub-letting and thus, affirmed the judgment and decree passed by the learned trial court.

The judgment and decree aforesaid are sought to be questioned in this second appeal jointly filed by the defendants Nos. 1 and 2, the original tenant and the alleged sub-lettee; and in the memorandum of appeal, the questions have been

formulated for consideration as substantial questions of law that: (a) Whether in the facts and circumstances of the case, the plaintiff Arjun Ram Prajapat could maintain the suit on the basis of the special power of attorney (Ex.2/A) which does not authorise him to file the suit on any other ground except bonafide requirement and the suit has not been filed on such ground; (b) Whether the suit was liable to be dismissed for having been presented and conducted by an unauthorised person; (c) Whether the learned courts below have proceeded without considering the admissions and misreading the material available on record including money order coupons and receipts Ex. A/1 to A/4 and oral evidence connected thereto; (d) Whether the decree on the ground of sub-letting without pleadings and proof of necessary ingredients thereof could be maintained; (e) Whether the plaintiff has not been able to prove the rate of rent at Rs.500/- per month and the defendant can be held defaulter merely for not submitting bank statement or cheques; and (f) whether in the absence of initial use being restricted, the suit shop cannot be used as store and the courts below were right in decreeing the suit on the ground of closure of shop ?"

Learned counsel for the appellants strenuously contended with reference to the document Ex.2 A that the interpretation put by both the learned courts below is contrary

to the document and that the courts have failed to consider the admission of the plaintiff in his cross-examination that reads thus:

> "यह सही है कि मेरी माताजी ने मुझे Ex. 2A के अलावा कोई अधिकार नहीं दिये । यह भी सही है कि Ex. 2A में लिखे अधिकारों के अलावा कोई अधिकार मेरी माताजी ने मुझे नहीं दिया है .... मेरे को मेरी माताजी ने मेरे बच्चे को धन्धा लगाने के आधार पर खाली कराने का विवादित दुकान के लिये कहा था उसके अलावा और कोई आधार मेरी माताजी ने मुझे नहीं बताया । मैंने यह दावा मेरी माताजी ने जो आधार बताये उन्ही के आधार दावा किया है ..... यह सही है कि Ex. 2A में किराया के चूक के आधार पर दावा पेश करने की बात नहीं लिखी है यह सही है कि मेरे लड़के की आवश्यकता के आधार के अलावा किसी भी अन्य आधार पर विवादित दुकान खाली कराने का अधिकार Ex. 2A में नहीं दिया है ।"

Learned counsel further submitted that the plaintiff has not come before the Court with clean hands and on the basis of the alleged power of attorney has attempted to suggested as if he was the plaintiff himself that remains entirely impermissible in law. Learned counsel submitted that the learned trial court has been in error in assuming as if it were a general power of attorney and has failed to consider that general and special power of attorney are different in character and carry different stamp duty. Learned counsel has referred to and relied upon a decision of the Hon'ble Supreme Court in the case of Janki Vashdeo Bhojwani & Anr. Vs. Indusind Bank

Ltd. : AIR 2005 SC 439. Learned counsel further contended that a power of attorney holder can appear only as a witness but is not permitted to appear as principal to prove the grounds of eviction. Learned counsel contended in relation to the ground of default that money order coupons and receipts produced on record as Ex.A-1 to Ex.A-4 have not at all been considered by the learned courts below and that has resulted in serious injustice; that if the said documents were considered by the courts below, it would have been clear that the rent was of course tendered by the tenant but the same was not accepted and once the factum of tender is established, the question of default does not arise. Learned counsel referred to and relied upon the decisions of this Court in B.B. Bhalla Vs. Rameshwar Krishore Badhwar : 2001 DNJ [Raj.] 298 and Radha Kishan Vs. LRs of Gulshan Behari : 2001 (5) WLC (Raj.) 375. Learned counsel further submitted that the finding regarding rate of rent at Rs.500/- is erroneous for there being no evidence, oral or documentary, on the part of the plaintiff in that relation; and contrary to the suggestion of the plaintiff, it has been established that the defendant did tender rent by sending the money order at the rate of Rs.255/- and if there was any objection regarding the rate of rent, the landlord would definitely have raised objection. In relation to the question of sub-letting, learned counsel submitted with

reference to the decision of the Hon'ble Apex Court in the case of Benjamin Permanand Rawade (Dead) by LRs. Vs. Anil Joseph Rawade : 1999 (2) Apex Court Journal 199 (SC) that to prove sub-tenancy two essential conditions are required to be satisfied that the sub-tenant was in exclusive possession of property; and that between the sub-tenant and chief tenant there was relationship of lessee and lessor. Learned counsel submitted that such conditions having not been established in the present case, decree for eviction could not have been passed. In relation to the ground of non-user, learned counsel contended that even if the premises in question were let out for the purpose of carrying on business of lathe machine and electric motor rewinding works, the allegation of non-user of the premises for six months is not correct; because if the premises were also used for storage of building material as established on record, it cannot be said that the defendant has not been using the premises in question.

Having given a thoughtful consideration to the grounds urged by the learned counsel for the appellants and having examined the material on record with reference to the law applicable to the present case, this Court is clearly of opinion that this second appeal remains bereft of substance and does not merit admission.

The hyper-technical submissions about the want of authority in maintaining the suit are fundamentally baseless. The landlady has extended the power of attorney (Ex.2A) in favour of her son that reads as under:-

"-:: मुख्तीयार नामा खास ::-

मुख्तीयार नामा खास का दस्तावेज लिखने वाली : अधिकार देहिन्दा श्रीमति लादूड़ी पत्नी श्री मांगीलाल जी उम्र 65 वर्ष निवासी नई सड़क जोधपुर में रहने वाली ।

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अधिकार ग्राहिता : श्री अर्जुन प्रजापत पुत्र श्री मांगीलाल जी प्रजापत निवासी नई सड़क - जोधपुर में रहने वाले ।

के हक में यह मुख्तीयार नामा खास का दस्तावेज इस अमर का तहरीर व तकमील कर देती हूं - मेरी आयु 65 वर्षा वृद्धावस्था की है । मैं अनपढ़ हूं । तथा अन्य घरेलू कार्यों में अत्यधिक व्यस्थ रहती हूं । इसलिये मेरी स्वयं की खरीद सुदा कामर्शियल प्लोट नं. 10 वाके जनता बाजार स्टेडियम ग्राउण्ड जोधपुर में बनाम 25.55 वर्गयार्ड का स्थित हैं । जिसका लीज डीड मेरे नाम पर पंजीयन सुदा हैं । मैं एक मात्र मालिक स्वामिनी हूं । कामर्शियल प्लोट नम्बर 10 के पाडौस विवरण निम्न प्रकार से हैं :-

उत्तर मे - दुकान नम्बर 20. दक्षिण मे - रोड़
पूर्व मे - दूकान नम्बर 18
पश्चिम मे : स्टेडियम ग्राउण्ड

के मुतालिक – जायदाद में स्थित दूकान श्री सरफराज जी के किराये पर दी हुई हैं - यानि किरायेदार काबिज हैं । मेरे पोते को दुकान जरूरत के कारण खाली करवानी हैं - मुतालिका समस्त प्रकार की उचित न्यायिक कार्यवाहियों को करने के लिये - मेरे पुत्र श्री अर्जुन प्रजापत को मुख्तीयार खास नियुक्त कर अधिकृत करती

हूं - आप मेरी और से इस जायदाद स्थित दूकान बाबत खाली करवाने की तमाम कार्यवाहीयो को करने के लिये, दावा, जबाब, सूचना पत्र, जबाबुल जबाब, रिव्यू अपील रिविजन इजराय कार्यवाही द्वारा दूकान का कब्जा प्राप्त करने, तथा दूकान का चढ़ा किराया वसूल करने, दूकान के दावा में आपसी समझौता, राजीनामा, वगैरा करने, तथा अगर किराया न्यायालय के पोते जमा हो तो उसको प्राप्त करने से संबंधित सभी प्रकार की कार्यवाहीयों को आप मेरी और से कर सकेंगे । मुकदमे में बयान साक्षी एंव हस्ताक्षर युक्त तमाम प्रकार की कार्यवाहीयों को करने के लिये भी आपको अधिकृत कर रही हूं ।

यह है कि इस मुकदमेयाबी की कार्यवाहीयो में एक पक्षीय या अन्य कोई कार्यवाहीया होती हैं तो उसमें भी आवश्यकतानुसार दरख्वास्त, जबाब, जबाबबुल जबाब, उत्तर प्रत्युत्तर वगैरा प्रस्तुत करने के लिये आप सक्षम व्यक्ति माने जावेंगे ।

कि आपको उपरोक्त सम्पत्ति के सम्बन्ध में समस्त प्रकार की न्यायिक निम्न न्यायालय से उच्चतम न्यायालय तक करने का अधिकार होगा एवम् तत्पश्चात उक्त सम्पति का कब्जा प्राप्त करने के लिये समस्त कार्यवाही करने का हक एवं अधिकार होगा इसके अलावा भी वे सभी कार्य जिसको करने के लिये मैं सक्षम हूं और इस मुख्तीयार नामा में नहीं लिखे गये है वे सभी आपको करने के हक एंव अधिकार होगें।

कि इस सम्बन्ध में कोई वकील प्लीडर वगैरा की नियुक्ति की जाती है तो उसमे होने वाले खर्चे की राशि भी आप अदा कर सकेगें ।

लिहजा यह मुख्तीयार नामा खास का दस्तावेज मैंने अपनी राजी खुशी अक्ल होशियारी होशो हवास तन्दुरूस्ती की हालत में स्वेच्छा से बिना किसी डर दबाव के तहरीर व तकमील कर दिया हैं जो सहीं एंव सनद रहे वक्त जरूरत के काम आवें ।"

It is apparent that the plaintiff-landlady Smt.Laduri was conscious of the requirements of her grand son and wanted to recover possession of the suit premises let out to defendant No.1; and, thus, extended special power of attorney to her son authorising him to adopt all the requisite proceedings for the purpose of recovering rent and possession of the suit premises; and authorised her son to do all acts in and in relation to legal proceedings up to the highest court for the purpose of recovering rent and possession of the property. The landlady has authorised her son for all other acts or deeds which she was competent to do, even if not spelt out in the deed.

It is not the requirement of law that while extending such power of attorney, the landlord is required to spell out the ground on which suit for recovery of possession is to be filed; nor by mentioning of the need of the grand son of the landlady, the deed in question could be construed as putting any limitation on the grounds to be taken in the suit for eviction, if otherwise available to her. The basic object of the document has been to authorise the attorney holder to take and conduct requisite proceedings for the purpose of recovering possession of the demised premises; particularly for the reason that the landlady was illiterate, was 65 years of age, and was more occupied in household. It is trite in law

that a document for the purpose of its construction is required to be read as a whole keeping in view the object behind the same; and it is not the correct approach to read certain words, lines or phrases in the document and assign them meaning *de hors* the context and object. There does not appear any infirmity in construction of the document as put by the learned subordinate courts; and this Court is satisfied that the contention urged on behalf of the appellants in that relation deserves to be rejected being fundamentally baseless.

It is to be imbibed that a second appeal under Section 100 CPC is entertained only if the case involves substantial question of law; and a substantial question of law has to be the question of real worth and not of technical value. The question posed in this case about competence of action with reference to the terms of the document Ex.2A is not even worth a technical value what to say of substance.

So far the question of evidence is concerned, true it is that a power of attorney holder could appear as a witness and not as the plaintiff himself; but then, the attorney could definitely depose in relation to the facts in his knowledge; and if the facts are established with the testimony of attorney, or any relevant witness, it cannot be said that non-appearance of plaintiff ought to be taken as fatal to every suit. In the decision relied upon by learned counsel for the appellants, it has not

been laid down as a blanket proposition that in every case invariably the plaintiff has to appear in evidence and if the plaintiff does not appear, the suit is bound to fail. In the present case, except suggesting such blanket proposition it has not been shown as to what material proposition of fact could not have been held proved for the absence of the landlady. The decisions relied upon by learned counsel for the appellants are of no help to the fact situation of the present case.

So far the decree for eviction is concerned, it is apparent on the face of record that the ground of eviction in terms of Section 13(1)(e) of the Act of 1950 is established, fair and square. The documents Ex.5 and Ex.3 placed on record show that the premises in question (shop No.10) were inspected by the authorities not once but twice over i.e., on 01.03.1998 and 23.06.1998; and on both the occasions, defendant No.2 Kailash son of Kishan Chand was found playing audio cassettes at the said shop No.10 at a high volume causing inconvenience to the public; and was challaned against. It is significant to notice that the proceedings in pursuance of such inspections were concluded before the Judicial Magistrate No.6 Jodhpur respectively on 04.03.1998 (Annex.6) and 30.06.1998 (Annex.4) and on both the occasions, the said defendant No.2 Kailash pleaded guilty

and was accordingly fined. It is significant to notice that no objection whatsoever was raised in relation to the inspection memo Ex.3 and Ex.5 wherein the address and place of occurrence has been stated at shop No.10 Caltex Bus Stand Road, Jodhpur i.e., the shop in question.

Coupled with the aforesaid is the significant fact that the said Kailash (defendant No.2) who has joined as co-appellant before the first appellate court and so also before this Court in this second appeal, has chosen not to appear in evidence at all. On the contrary, his father DW-2 K.M. Peshwani has appeared in evidence and his statement gives rise to more questions rather than supplying any answers. In the affidavit submitted towards examination-in-chief, the witness has stated about his having one shop adjoining the shop in question in which he was carrying on business of footwear and audio cassette and sometimes the goods were placed outside the shop also; that his son was working with him only and was challaned for noise pollution while playing audio cassettes at his shop only; and that shop No.11 was taken on rent by his son from Smt. Ratni Prajapat and has now been purchased by his son at Rs.32,000/-. In cross-examination the witness has suggested that his sons Pradeep, Prakash and Kailash were carrying on business in two shops and the disputed shop was lying between their two shops; and

that his son Kailash was carrying on business of audio cassettes at the shop measuring 10 ft. x 25 ft. The witness has also suggested regarding himself that it had been 25 years since he did any business at the shop of audio cassettes. He has avoided answering the question regarding identification number of shop as stated in challan Ex.5. This uncertain and ambiguous statement coupled with the fact that the said sub-lettee, defendant No.2 Kailash, did not appear in evidence makes it clear that the defendants have attempted to avoid correct facts. On the basis of evidence as produced on record and as omitted to be produced, the learned subordinate courts cannot be said to have erred in arriving at the conclusion that the tenant has assigned the suit shop to the defendant No.2 Kailash; and was liable to be evicted on this ground alone. Such finding of fact in this case does not call for any interference and does not give rise to any substantial question of law as suggested by the learned counsel for the appellant.

In the case of Benjamin Permanand Rawade (supra), the Hon'ble Apex Court considered the question arising under the Bombay Rent Act, 1947 where the appellant sought protection as a lawful sub-tenant. The trial court found the appellant not to be a lawful sub-tenant; but his appeal was allowed by the appellate court holding him a sub-tenant of the

chief tenant. However, the appellate court's order was reversed by the High Court in petition under Article 227 of the Constitution of India and that of the trial court was restored. It was in the context of such protection claimed that the Hon'ble Apex Court observed that to establish that the appellant was a sub-tenant of the chief tenant, two essential conditions were required to be satisfied through evidence: (1) that the appellant was in the exclusive possession of the property in question; and (2) that between the appellant and the chief tenant, there was a relationship of lessee and lessor. The Hon'ble Court held that the first condition has been established but the second condition has not at all been established and it cannot be said that the appellant was the sub-tenant of the chief tenant. The said case of Benjamin Permanand Rawade (supra) has no application to the facts of the present case. It is not the case of the appellants that any lawful sub-tenancy was created with the permission of the landlord. The present case has been dealt with under Section 13(1)(e) of the Act of 1950 that provides the ground of eviction thus :

> "(e) that the tenant has assigned, sub-let or otherwise parted with the possession of, the whole or any part of the premises without the permission of the landlord."

The plaintiff has clearly averred in the plaint that the defendant-tenant has sub-let the premises to defendant No.2 and has handed over possession to him; that the amount of rent agreed between them was not in her knowledge; and has referred to the fact of the said sub-lettee having been found playing audio cassettes on the shop in question and having been challaned. The plaintiff has established by primary evidence that the appellant-defendant No.2 was found working at the shop in question; and there being no convincing rebuttal nor even explanation of such facts established, coupled with the adverse inference that is required to be drawn for the appellant No.2 not entering the witness-box, the finding in conformity with Section 13(1)(e) of the Act cannot be said to be suffering from any illegality and calls for no interference.

However, it may be pointed out that the learned courts below have further rightly decreed the suit for eviction on the ground of default in payment of rent. After considering the evidence on record and surrounding circumstances, the learned subordinate courts have found the rate of rent at Rs.500/- per month; and the core fact asserted by the defendant-tenant of the rent being Rs.255/- per month has not been found correct. With such finding on the rate of rent, the alleged tender of rent at Rs.255/- per month is of no avail. It has also come on record that this Court fixed the rate of rent

at Rs.400/- per month during pendency of the suit by the order dated 16.04.2002; and the defendant has failed to deposit the rent at the rate so fixed. Obviously, the tenant was not entitled for any protection under Section 13 (6) of the Act either.

In the aforesaid view of the matter, the other ground of eviction, i.e., non-user of premises, does not even require consideration and the decree in question is required to be affirmed. This Court is clearly of opinion that this case does not involve any substantial question of law.

The second appeal fails and is, therefore, dismissed.

At this stage, learned counsel Mr. H.R. Soni appearing for the appellants submits that some reasonable time may be extended for the purpose of vacating the suit premises. To such proposition, learned counsel Mr. R.K. Thanvi appearing for the plaintiff-respondent, in all fairness, submits that he is agreeable to extend the time for vacating the premises upto **31.03.2008**, of course, subject to the condition that the entire decreetal amount and arrears of rent be deposited by the tenant-defendant. Such propositions appear reasonable and, therefore, while dismissing this second appeal for the case involving no substantial question of law, the defendant-tenant is permitted to vacate the suit premises by **31.03.2008** on the following conditions:

(i) The defendant-tenant shall personally submit an undertaking supported by affidavit before the trial court within three weeks from today to the effect that on or before 31.03.2008 peaceful and vacant possession of the suit premises shall be handed over to the plaintiff. He shall also undertake not to cause any damage to the suit premises nor to make any alteration and not to cause any nuisance.

(ii) The appellant-tenant shall deposit within three weeks the arrears, if any, of the rent and of the decreetal amount; and shall further pay to the plaintiff the amount for use and occupation of the suit premises at the rate of Rs. 500/- per month or deposit this amount in the bank account of the plaintiff (if particulars whereof are furnished) month by month on or before 15th day of the next month.

It is made clear that upon failure to comply with any of the conditions aforesaid or violating any terms of the undertaking, the plaintiff shall be entitled to execute the decree forthwith in accordance with law.

(DINESH MAHESHWARI), J.

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